Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1076

TRUSTEES OF THE OPERATING ENGINEERS PENSION TRUST,

Petitioners,

vs.

MICAL KATHLEEN PILATTI,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District.

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IN THE

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October Term, 1979
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TRUSTEES OF THE OPERATING ENGINEERS PENSION TRUST,

Petitioners,

vs.

MICAL KATHLEEN PILATTI,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari be issued to review the judgment of the Court of Appeal of the State of California, Fourth Appellate District, which was filed on August 16, 1979.

Opinion Below.

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, is reported at 96 Cal.App.3d 63, 157 Cal.Rptr. 594 and appears at Appendix A of this Petition. The minute order of the California Supreme Court appears at Appendix B.

Jurisdiction.

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, was filed on August 16, 1979 and modified on September 6, 1979. The Supreme Court of California denied a hearing on October 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented.

The questions presented by this petition are:

1. Does a State court have jurisdiction of an action which, for its determination, requires the application or clarification of the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA")?

2. Does ERISA preempt California community property law insofar as that State law provides a non-participant spouse an interest in an employee benefit plan?

3. Does ERISA prohibit the order of the lower court that the Petitioners, as the trustees of an employee benefit plan, pay pension benefits directly to the Respondent, a non-participant spouse?

Statutes Involved.

This case involves the following statutes, the pertinent parts of which are set forth in Appendix C: 26 U.S.C. § 401; 28 U.S.C. § 1257; 29 U.S.C. § 1002; 29 U.S.C. § 1056; 29 U.S.C. § 1102; 29 U.S.C. § 1103; 29 U.S.C. § 1104; 29 U.S.C. § 1109; 29 U.S.C. § 1131; 29 U.S.C. § 1132; 29 U.S.C. § 1144; 45 U.S.C. § 231d; 45 U.S.C. § 231m and California Civil Code § 4363.1.

Statement of the Case.

The Respondent ("Wife") was married to William Anton Pilatti ("Husband") in July, 1966, and they separated on December 30, 1974. (C.T. pp. 122, 237.)[1] Between July 1, 1969, and December 31, 1974, the Husband accumulated credits in the Pension Plan of the Operating Engineers Pension Trust. (C.T. p. 102.) The Pension Plan gives participants therein a choice of several forms of pension payments. (C.T. pp. 193-198.) The provisions of the plan, however, allow pension payments to be made only to a participant in the plan or, if he dies, to his surviving spouse, his designated beneficiary, or his heirs or estate, depending on the circumstances. (C.T. pp. 193-198, 202-203.)

On June 10, 1976, the Wife filed an Amended Petition for Dissolution of Marriage declaring that retirement benefits were available from the Southern California Operating Engineers Benefits Administration, Inc. ("SCOEBA"), a nonprofit corporation organized to perform administrative services for the Operating Engineers Pension Trust, and further declaring that the benefits constituted community property subject to disposition by the Court. (C.T. pp. 16-17.) Thereafter, on August 23, 1976, the Wife moved to join SCOEBA as a party to the dissolution proceedings, alleging that SCOEBA had control of pension funds which were a community asset of the Wife and Husband. At the same time, the Wife filed a complaint for a resulting trust praying that a portion of the pension funds be held in trust for her and that SCOEBA be ordered to pay that share of the funds to her.

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[1]"C.T." refers to Clerk's Transcript of the Superior Court proceedings conducted below.

(C.T. pp. 26-28.) The Petitioners ("Trustees") filed a response to the motion for joinder and an answer to the complaint alleging as an affirmative defense that ERISA would preclude the order prayed for by the Wife. (C.T. p. 36.) The joinder was ordered on October 18, 1976. (C.T. p. 80.)

An interlocutory judgment of dissolution of marriage was entered on December 10, 1976. The judgment provided that the court would retain jurisdiction over the issue of any pension or retirement benefits which might accrue to the Husband by virtue of his employment. (C.T. p. 133.) After a trial on the Wife's third-party complaint, the court awarded the Wife a portion of the pension credits that had been accumulated by the Husband and ordered the Trustees to pay this portion of the benefits directly to the Wife. The court's judgment (Appendix D), in part, stated as follows:

> "The Employee Retirement Income Security Act of 1974 may not be construed so as to divest Petitioner of her vested right in her community share of pension credits, and benefits based thereon, which were earned by Respondent during the parties' marriage. Such a construction would constitute a taking of property without due process of law." (C.T. p. 238.)

Judgment was entered on April 16, 1978. (C.T. p. 241.) The Trustees filed a timely notice of appeal on June 14, 1978. (C.T. p. 243.) The matter was briefed and the Trustees raised the issues which are now presented in this writ. On August 16, 1979, the Court of Appeal of the State of California, Fourth Appellate District, filed its opinion affirming the judgment of the trial court.

The appellate court dismissed the Trustees' contention that federal courts have exclusive jurisdiction in actions involving the application or clarification of the provisions of ERISA with the following comment:

> "As to the issue of jurisdiction, Trustees propound a very literal interpretation of ERISA and its legislative history. Such an interpretation would require the removal to federal court of any case that even remotely concerns an employee's pension rights. This is clearly not what Congress intended."

The appellate court also rejected the Trustees' contention that ERISA preempts California community property law stating that:

> "In *Johns v. Retirement Fund Trust*, 85 Cal.App. 3d 511, this court dealt with the issue. We concluded ERISA does not preempt California community property law as applied to retirement benefits."

The appellate court further reasoned that the Wife was an owner of part of the retirement benefits. The appellate court stated: "She is not a creditor of her husband but a 'participant' in the pension by operation of law. An order requiring the Trustees to pay to Mrs. Pilatti her share of the retirement benefits does not conflict with ERISA."

The Trustees filed a timely petition for a hearing in the Supreme Court of the State of California to review the decision of the Court of Appeal. The California Supreme Court denied a hearing on October 11, 1979.

REASONS FOR GRANTING THIS WRIT.

1. The Issues Presented Importantly Affect the Day-to-Day Administration of Substantially All Pension Plans.

The Trustees of the Operating Engineers Pension Trust are now actively engaged in litigation and appeal in more than fifty marital dissolution proceedings in seven counties of California. In each case, the non-participant spouse of a participant in the Operating Engineers Pension Trust ("Trust") is seeking an order directing the Trust to pay a portion of the pension benefits payable to the participant directly to the non-participant spouse. In many of the cases the non-participant spouse has also requested an order restraining the Trust from paying pension benefits to the participant pending the determination of the non-participant spouse's interest in Trust benefits. Seven of these cases, including the instant case, have resulted in judgments necessitating an appeal by the Trustees. All of the cases involve the identical issues presented in this writ.

Since enactment in 1977 of California Civil Code Section 4363.1, which facilitates the joinder of an employee benefit plan in a marital dissolution proceeding, the number of these cases in which the Trust is involved has increased dramatically. In 1979, the Trust was joined in such a proceeding on an average of twice a month. This is not surprising considering the decision by the California Supreme Court in the case *Smith v. Lewis,* 13 Cal.3d 349, 118 Cal.Rptr. 621 (1975), holding that an attorney who does not pursue his client's community property claim to pension benefits available from the employee benefit plan of the participant spouse, even in doubtful cases, may be liable for malpractice.

Each of the cases in which the Trust has been joined will probably require at least one appearance in the trial court, at a motion or at trial, and each will require the filing of briefs for that appearance. Until the issues presented by this writ are resolved by this Court, it is likely that most of these cases will result in an appeal.

The experience of the Operating Engineers Pension Trust is not unique. Other employee benefit plans governed by ERISA are in the same quandary and many are similarly involved in litigation and appeal. In little more than a year's time, at least three separate employee benefit plans, in addition to the Operating Engineers Pension Trust, have unsuccessfully appealed adverse rulings of California courts on the issue of ERISA preemption of California community property law. [*Johns v. Retirement Fund Trust, etc.*, 85 Cal.App.3d 511, 149 Cal.Rptr. 551 (1978); *In re Marriage of Johnston*, 85 Cal.App.3d 900, 149 Cal.Rptr. 798 (1978); *In re Marriage of Campa*, 89 Cal.App.3d 113, 152 Cal.Rptr. 362 (1979).]

The ground swell of litigation generated by this one issue of ERISA preemption has significantly increased legal fees and other costs for the Operating Engineers Pension Trust. Other employee benefit plans have no doubt been burdened in the same manner. Furthermore, thousands of couples involved in what might otherwise have been routine, inexpensive marital dissolution proceedings now find themselves enmeshed in lengthy and expensive litigation and appeal. Resolution of the issues presented in this petition would benefit all pension plans governed by ERISA, and would benefit the many individual litigants whose mari-

tal dissolutions have been affected by the uncertainty in this area of law.

2. The Order of the Lower Court Commanding the Trust to Pay Benefits Directly to the Non-Participant Spouse Is Contrary to the Provisions of ERISA and Compels the Trustees to Choose Between Disobeying the Court Order or Breaching Their Fiduciary Duties Under ERISA.

ERISA requires that an employee benefit plan be established and maintained pursuant to an instrument in writing. [29 U.S.C. § 1102(a)(1).] The Agreement Establishing the Operating Engineers Pension Trust and the Operating Engineers Pension Plan together compose the written instrument by which the employee benefit plan involved in this case was established and is maintained. One of the required features of such a plan is that the written instrument governing the plan must specify the basis on which payments are made to and from the plan. [29 U.S.C. § 1102(b)(4).] The provisions of the Operating Engineers Pension Plan do precisely that, and those provisions do not permit payments from the plan to be made to one who claims entitlement merely as the former spouse of a participant. Payment of pension benefits may be ma[illegible] only to a participant, and upon his death, depending on the circumstances, benefits are payable only to his surviving spouse or his designated beneficiary, heirs or estate.

ERISA also declares that the Trustee or Trustees of an employee benefit plan shall have exclusive authority and discretion to manage and control the assets of the plan. [29 U.S.C. § 1103(a).] Furthermore, ERISA specifically requires that the assets of the plan ". . . shall be held for the exclusive purposes of providing

benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan" [29 U.S.C. § 1103(c)(1)], and the Internal Revenue Code conditions the tax exempt status of the Trust on compliance with this mandate. [26 U.S.C. § 401(a)(2).] The former spouse of a plan participant, following a decree of marital dissolution, is neither a participant in the plan nor a beneficiary unless specifically so designated by the participant. [29 U.S.C. § 1002(7); 29 U.S.C. § 1002(8).] The importance in the congressional plan for insuring that assets are held only for the benefit of participants and beneficiaries is emphasized in the provisions of ERISA concerning fiduciary duties, which requires that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries." [29 U.S.C. § 1104(a)(1).] The breach of this fiduciary duty subjects the Trustees of the plan to the possibility of civil or, in the case of a willful violation, even criminal liability. [29 U.S.C. §§ 1109, 1131.]

The court order below cannot be reconciled with the unambiguous provisions of the controlling federal law. Such an order divests the Trustees of authority granted them by the trust instrument in accordance with ERISA. The order alters the terms of the employee benefit plan contrary to the clear mandate of Congress. The order commands the trustees to breach their fiduciary duty, and compels them to jeopardize the tax exempt status of the trust.

Such an order for direct payments from the plan to the Wife also directly conflicts with Section 206 of ERISA [29 U.S.C. § 1056(1)], which states that

"each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." The tax exempt status of the trust is conditioned on the inclusion of a provision in the pension plan prohibiting assignment or alienation of benefits. [26 U.S.C. § 401(a)(13).] The regulations under § 401(a)(13) of the Code define assignment and alienation broadly to include "[a]ny direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary." Thus, federal law prohibits any and all assignment or alienation of benefits. There is no exception in either ERISA or the Internal Revenue Code for California community property laws.

Furthermore, an order for direct payment to the Wife places additional burdens on the Trust, burdens which all the participants and beneficiaries of the trust will be forced to pay. Of course, one case cannot significantly affect the administration of trust benefit payments. But when multiplied by hundreds the effect must be apparent. California community property laws cannot be applied to the Pension Plan in this case without exposing the Pension Plan and every other pension plan to the expenses, complexities and delays of complying with the marital laws of every state where a participant or spouse may become domiciled. Additional records will be required. A dramatic increase in oral and written inquiries to the Trust by the judicially created benefit recipients must be expected and, consequently, more trust personnel will be needed to manage the upsurge of administrative chores. Legal

costs will surely rise, for the trust will be drawn into myriad disputes in this age of multiple marriages, "common-law" marriages and non-marriages. These disputes often involve parties residing in various states, each party being governed by different statutes and concepts of marital property. Finally, state laws giving rise to testamentary interests in community property will multiply the number and type of claimants who can obstruct the timely payment of pension benefits.

All of this means *delay* in the payment of benefits, thereby frustrating a primary goal of ERISA to enhance *prompt* payment of pension benefits through uniform, central regulation.

3. A Determination of the Issue of ERISA Preemption of California Community Property Law Would Provide Urgently Needed Guidance for All Employee Benefit Plans Governed by ERISA.

The Trust cannot comply with the mandate of ERISA if the Trust pays benefits directly to a non-employee former spouse of a participant in the Pension Plan of the Trust. The doctrine of preemption was conceived specifically to preclude such a frustration of congressional purpose. [*Amalgamated Association, etc. v. Lockridge,* 403 U.S. 274, 285-286, 91 S.Ct. 1909, 1917 (1971).] California community property law cannot be allowed to nullify the congressional plan. *Perez v. Campbell,* 402 U.S. 637, 652, 91 S.Ct. 704, 712 (1971).

ERISA clearly satisfies all judicial requirements necessary to justify an inference of federal preemption even in the absence of an express preemption clause in the statute. Yet, in addition, ERISA contains an

express preemption clause with an intentionally broad and sweeping scope.

> "(a) Except as provided in subsection (b) of this section, the provisions of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title. This section shall take effect on January 1, 1975." 29 U.S.C. § 1144.

Despite the unequivocal language of the preemption section of ERISA, California courts continue to issue orders which place employee benefit plan trustees at their peril by forcing them to choose between obeying the court's order or complying with the mandate of ERISA. Only this Court can end the dilemma of such trustees.

4. The Decision of the Lower Court in This Case Conflicts in Principle With Other Decisions of This Court.

On January 22, 1979, this Court rendered its decision in the case of *Hisquierdo v. Hisquierdo,* .... U.S. ...., 99 S.Ct. 802 (1979). There, the petitioner husband had initiated a proceeding to terminate his marriage. He was a railroad machinist who was entitled, under the Railroad Retirement Act of 1974 ("Act") [45 U.S.C. § 231 *et seq.*], to receive retirement benefits if and when he attained age 60. The respondent wife requested an order that she be granted a portion of those benefits because of a community property interest in them.

The trial court denied her request and the appellate court affirmed, relying on § 231m of the Act, which provides that:

> "Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated. . . ."

The California Supreme Court reversed, reasoning that the wife was not a creditor but a present owner. This Court granted certiorari to consider whether the award to the wife impermissibly conflicted with the Act.

This Court reversed and remanded citing *Wissner v. Wissner,* 338 U.S. 655, 70 S.Ct. 398 (1950), *Free v. Bland,* 369 U.S. 663, 82 S.Ct. 1089 (1962), and several other cases concerning preemption of state community property law. This court stated:

> "Here, California must defer to the federal statutory scheme for allocating Railroad Retirement Act benefits insofar as the terms of federal law require. The critical terms here include a specified beneficiary protected by a flat prohibition against attachment and anticipation."

The *Hisquierdo* decision provides convincing support by analogy for the view that the unambiguous language of ERISA must be given the effect which Congress intended, *i.e.*, the preemption of all state laws relating to employee benefit plans.

5. California State Courts Lacked the Jurisdiction to Determine This Case Because Federal Courts Have Exclusive Jurisdiction Over All Suits Involving the Application or Clarification of the Provisions of ERISA.

Section 502(e)(1) of ERISA [29 U.S.C. § 1132 (e)(1)] states:

> "Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section."

The sole exception to exclusive federal jurisdiction over suits by or against employee benefit plans, [29 U.S.C. § 1132(a)(1)(B)], is for suits brought to enforce or clarify rights *under the terms of the plan.* The Wife's claim that she is entitled to receive a portion of the pension benefits payable to the Husband from the Operating Engineers Pension Trust is a claim based upon rights arising under California community property law, not "under the terms of the plan."

Whether California community property law giving rise to a claim against an employee benefit plan is preempted by ERISA, requires clarification, interpretation, and application of ERISA. The federal courts, not state courts, were expressly intended by Congress to have exclusive jurisdiction of actions to clarify, interpret and apply ERISA. The legislative history of ERISA makes this clear. *Legislative History of the*

Employee Retirement Income Security Act of 1974, p. 4594.

ERISA contains a broad preemption clause which, by its terms, supersedes all state laws as they relate to employee benefit plans. This case cannot be fully adjudicated without the interpretation and application of that clause, as well as other substantive provisions of ERISA. Therefore, the federal courts were the only proper forum to determine the claims made against the Pension Plan in this case.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: January 7, 1980.

Respectfully submitted,

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APPENDIX A.

Opinion of the District Court of Appeal.

CERTIFIED FOR PUBLICATION

In the Court of Appeal, Fourth Appellate District, Division One, State of California.

Mical Kathleen Pilatti, Third-Party Plaintiff and Respondent, v. Trustees of the Operating Engineers Pension Trust, et al, Third-Party Defendants and Appellants. 4 Civ. No. 18287 (Super. Ct. No. D-97078).

Filed: Aug. 16, 1979.

APPEAL from a judgment of the Superior Court of San Diego County. Hugo Fisher, Judge. Affirmed.

Wayne Jett and Robert Scot Clifford for Appellants.

Legal Aid Society of San Diego, Inc., Family Law Center, and Ellen Geis and Charles Wolfinger, for Respondent.

The Pilattis were married in April 1968 and separated in December 1974. During part of that period Mr. Pilatti accumulated credits in the pension plan of the Operating Engineers Pension Trust (Trust). The Trust is regulated by the Employee Retirement Income Security Act of 1974 (ERISA). Under the provisions of the plan, benefit payments may be made only to "participants" or, on death, to the surviving spouse, designated beneficiary, or estate.

In September 1975 respondent Mrs. Pilatti filed a petition for dissolution of marriage. Upon learning of her husband's pension benefits, she moved to join the Trustees of the Operating Engineers Pension Trust (Trustees) as a third party to the dissolution proceedings. She alleged Trustees had control of pension funds

which were community property and subject to the disposition of the court. In the final judgment of dissolution the superior court ordered the Trustees to pay one-half of the retirement benefit directly to Mrs. Pilatti.

The former husband has not appealed. The appellant Trustees, however, contend under federal preemption (1) this court lacks jurisdiction in the face of the exclusive jurisdiction of the federal courts in matters involving ERISA, and (2) an order instructing the Trustees to pay benefits directly to Mrs. Pilatti violates ERISA and contradicts the provisions of the trust.

As to the issue of jurisdiction, Trustees propound a very literal interpretation of ERISA and its legislative history. Such an interpretation would require the removal to federal court of any case that even remotely concerns an employee's pension rights. This is clearly not what Congress intended.

"(a) A civil action may be brought—

"(1) by a participant or beneficiary—

". . . . . .

"(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

". . . . State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section." (ERISA, 29 U.S.C., § 1132.)

In this case, the interpretation and application of specific provisions of ERISA is not involved. This is merely the application of California community property law to an asset which is subject to federal regulation. Mrs. Pilatti's community property claim against

her husband's pension trust may impliedly allege rights under ERISA but this does not provide a basis for removal of the claim to federal court (*In re Marriage of Pardee*, 408 F.Supp. 666).

ERISA may be a "comprehensive statutory enactment" with general preemptive provisions but it hardly bestows exclusive jurisdiction on federal courts. Domestic relations, for example, is an area of law traditionally reserved for state regulation, and is peculiarly unsuited to control by federal courts (*Buechold v. Ortiz*, 401 F.2d 371). Requiring removal to federal court of a state dissolution proceeding because the marital property includes a federally regulated pension plan is "an intolerable interference with traditional state functions" (*In re Marriage of Pardee, supra*, 408 F.Supp. 666, 669). Numerous California appellate court decisions have distributed pension funds despite the concurrent application of ERISA.

In *Johns v. Retirement Fund Trust*, 85 Cal.App.3d 511, this court dealt with the issue. We concluded ERISA does not preempt California community property law as applied to retirement benefits.

This case, like *Johns*, involves retirement benefits which are community property and are entirely vested under California law (Civ. Code, § 5105; *In re Marriage of Fithian*, 10 Cal.3d 592). The Pilattis share an equal ownership interest in all this community property and are regarded as tenants in common of such property on dissolution or separation (*In re Marriage of Brown*, 15 Cal.3d 838).

It is a basic premise of California community property law that Mrs. Pilatti earned the retirement benefits, no less than her former husband, as an equal participating partner in their marriage. She is an owner

of the benefits by virtue of the community status (*In re Marriage of Johnston,* 85 Cal.App.3d 900; *In re Marriage of Campa,* 89 Cal.App.3d 113).

Trustees contend an order directing them to make benefit payments to Mrs. Pilatti conflicts with ERISA in that both the federal statute and specific provisions of the pension plan prohibit "assignment and alienation" of benefits. In California a spouse's claim of ownership does not constitute assignment, attachment or alienation (*Phillipson v. Board of Administration,* 3 Cal.3d 32). *In re Marriage of Sommers,* 53 Cal. App.3d 509, involved a similar anti-assignment provision contained in a pension plan subject to a community property claim. The court, recognizing the nonemployee spouse's status as an owner, ordered the direct payment of her community property share to her. In this case, Mrs. Pilatti is also the owner of her share of the retirement benefits. She is not a creditor of her husband but a "participant" in the pension by operation of law. An order requiring the Trustees to pay to Mrs. Pilatti her share of the retirement benefits does not conflict with ERISA.

Such an order is also appropriate in this case. A court in a dissolution proceeding is empowered to effect a substantially equal division of community property (Civ. Code, § 4800). A pension fund may properly be joined as a party to the action as a means of achieving an equal distribution (*Phillipson v. Board of Administration, supra,* 3 Cal.3d 32; *In re Marriage of Sommers, supra,* 53 Cal.App.3d 509). A pension fund which has been properly joined as a party may be ordered by the court to make payments directly to the nonemployee spouse (*In re Marriage of Johnston, supra,* 85 Cal.App.3d 900).

The burden and potential "harms" to the Trust in requiring it to make benefit payments directly to Mrs. Pilatti are quite insignificant in comparison to California's interest in ensuring she receives that which is rightfully hers.

Trustees contend California cases should be considered in light of the recent United States Supreme Court case of *Hisquierdo v. Hisquierdo,* .... U.S. .... [99 S.Ct. 802]. *Hisquierdo* is distinguishable, however, in that it concerns a nonemployee spouse's right to share in her husband's retirement benefits under the Railroad Retirement Act of 1974 (45 U.S.C., §231 et seq.).

Hisquierdo emphasizes the Railroad Retirement Act provides a total statutory scheme for the maintenance of a retirement fund resembling public welfare. The benefits may be modified, or even terminated, by Congress at any time. The participant cannot be said to "own" any benefits until Congress actually determines that they be paid. ERISA, on the other hand, merely regulates private pension programs to prevent their maladministration (*Stone v. Stone,* 450 F.Supp. 919). The Supreme Court in *Hisquierdo* stated in a footnote[1] its holding was not indicative of its view concerning the application of community property law to benefits

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[1]"In this case, Congress has granted a separate spouse's benefit, and has terminated that benefit upon absolute divorce. Different considerations might well apply where Congress has remained silent on the subject of benefits for spouses, particularly when the pension program is a private one which federal law merely regulates. See Employee Retirement Income Security Act of 1974, 88 Stat. 829, 29 U.S.C. § 1001 *et seq.* Our holding intimates no view concerning the application of community property principles to benefits payable under programs that possess these distinctive characteristics." (*Hisquierdo v. Hisquierdo, supra,* ..... U.S. ..... [99 S.Ct. 802, 813].)

payable under private pension programs subject to federal regulation.

Judgment affirmed.

CERTIFIED FOR PUBLICATION.

Brown *P.J.*

WE CONCUR:

Cologne, *J.*

Staniforth, *J.*

Modification of Opinion.

Court of Appeal—State of California, Fourth Appellate District, Division One.

Filed: September 6, 1979.

Mical Kathleen Pilatti, Third-Party Plaintiff and Respondent, vs. Trustees of the Operating Engineers Pension Trust, et al., Third-Party Defendants and Appellants. No. 18287 SUPERIOR COURT NO. D-97078.

BY THE COURT:

The opinion in the above matter filed August 16, 1979, is modified as follows:

Page 1, line 6, substitute "July 1966" in place of "April 1968."

Page 2, paragraph 2, line 9, substitute "benefits" in place of "benefit" and add "accumulated during the marriage"; thus the last sentence in the paragraph should read:

> "In the final judgment of dissolution the superior court ordered the Trustees to pay one-half of the retirement benefits accumulated during the marriage directly to Mrs. Pilatti."

Brown, *Presiding Justice*

Copies to: Los Angeles Daily Journal, The Daily Transcript, Metro News, West Publishing Co. Bancroft-Whitney Co., Los Angeles County Law Library, San Diego County Law Library, Honorable Hugo Fisher, Legal Aid Society, Robert Scot Clifford, Esq.

APPENDIX B.

CLERK'S OFFICE. SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

OCT 11 1979

I have this day filed Order

HEARING DENIED

In re: 4 Civ. *No.* 18287

Pilatti

vs.

Trustees of the Operating Engineers Pension Trust

Respectfully,

G. E. BISHEL
Clerk

68378-877 2-79 4M OSP

APPENDIX C.

Statutory Provisions Involved.

1. 26 U.S.C. §401 provides in pertinent part:

(a) Requirements for qualification.—A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

> (2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries;
>
> (13) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. . .

2. 28 U.S.C. §1257 provides, in pertinent part:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution,

treaties or statutes of, or commission held or authority exercised under, the United States.

3. 29 U.S.C. §1002 provides, in pertinent part:

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

4. 29 U.S.C. §1056 provides, in pertinent part:

(d)(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

5. 29 U.S.C. §1102 provides, in pertinent part:

(a)(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

6. 29 U.S.C. §1103 provides, in pertinent part:

(a) Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named

fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan . . .

(c)(1) Except as provided in paragraph (2) or (3) or subsection (d) of this section, or under section 1342 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit on any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

7. 29 U.S.C. §1104 provides, in pertinent part:

(a)(1) Subject to section 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

8. 29 U.S.C. §1109 provides, in pertinent part:

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal

of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

9. 29 U.S.C. §1131 provides, in pertinent part:

Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

10. 29 U.S.C. §1132 provides, in pertinent part:

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(e)(1) Except for action under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

11. 29 U.S.C. §1144 provides, in pertinent part;

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a)

of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

12. 45 U.S.C. §231d provides, in pertinent part:

(3) The entitlement of a spouse of an individual to an annuity under section 231a(c) of this title shall end on the last day of the month preceding the month in which (A) the spouse or the individual dies, (B) the spouse and the individual are absolutely divorced, or (C) in the case of a wife who does not satisfy the requirements of clause (ii)(A) of (ii)(B) or section 231a(c)(1) of this title (other than a wife who is receiving such annuity by reason of an election under section 231a(c)(2) of this title), such wife no longer has in her care a child described in clause (ii)(C) of section 231a(c)(1) of this title, whichever first occurs.

13. 45 U.S.C. §231m provides, in pertinent part:

Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia,

no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated: *Provided, however,* That the provisions of this section shall not operate to exclude the amount of any supplemental annuity paid to an individual under section 231a(b) of this title from income taxable pursuant to the Federal income tax provisions of Title 26.

14. California Civil Code §4363.1 provides, in pertinent part:

(a) Upon written application by a party to a proceeding under this part, the clerk shall enter an order joining as a party to the proceeding any employee pension benefit plan in which either party to the proceeding claims an interest which is or may be subject to disposition by the court.

APPENDIX D.

Judgment on Complaint for Resulting Trust Dividing Pension Benefit Plan and Providing Method of Payment.

Superior Court of California, County of San Diego.

In re the Marriage of: Mical Kathleen Pilatti, Petitioner, and William Anton Pilatti, Respondent.

Mical Kathleen Pilatti, Third-Party Plaintiff, vs. Trustees of the Operating Engineers Pension Trust and Southern California Operating Engineers Benefits Administration, Inc., Third-Party Defendants. Case No. D 97078.

Filed: April 17, 1978.

The third-party Complaint for Declaration of Resulting Trust herein came on regularly for trial on February 15, 1977, before the Honorable HUGO M. FISHER, Judge presiding. ELLEN GEIS of the Legal Aid Society of San Diego, Inc. appeared as counsel for Petitioner and Third-Party Plaintiff, MICAL KATHLEEN PILATTI, (hereinafter referred to as "Petitioner"), JOHN FAUVRE of the law firm of Wayne Jett appeared as counsel for Third-Party Defendants, Trustees of the Operating Engineers Trust Funds and Southern California Operating Engineers Benefits Administration, Inc. (hereinafter collectively referred to as "Trustees"), and there was no appearance by or on behalf of Respondent, WILLIAM ANTON PILATTI, (hereinafter "Respondent"). Upon evidence received, both oral and documentary, and argument taken in open court, and the Court having rendered its intended decision on February 15, 1977, it is found that:

1. Petitioner and Respondent were married on July 30, 1966, and separated December 30, 1974, the duration of the marriage being eight (8) years, five (5) months, zero (0) days.

2. The Trustees administer a joint labor-management employee pension benefit plan (hereinafter referred to as "Plan").

3. Respondent's pension rights under the Plan and accrued during the marriage are community property, and are divisible by this Court under *Civil Code* Section 5110[1] and the case law.[2]

4. The Employee Retirement Income Security Act of 1974 may not be construed so as to divest Petitioner of her vested right in her community share of pension credits, and benefits based thereon, which were earned by Respondent during the parties' marriage. Such a construction would constitute a taking of property without due process of law.

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[1]Community property; presumption as to property acquired by wife; limitations of actions; leasehold interest:

Except as provided in Sections 5107, 5108, and 5109 and subdivision (c) of Section 5122, all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state, and property held in trust pursuant to Section 5113.5, is community property. *Civil Code* § 5110.

[2]The law is now settled in California that "retirement benefits which flow from the employment relationship, to the extent they have vested, are community property subject to equal division between the spouses in the event the marriage is dissolved". (*In Re Marriage of Fithian* (1974) *supra,* 10 Cal. 3d 592, 596, citing *Waite v. Waite* (1972) *supra,* 6 Cal.3d 461; *Phillipson v. Board of Administration* (1970) *supra,* 3 Cal.3d 32; *Benson v. City of Los Angeles* (1963), 60 Cal.2d 355 [33 Cal.Rptr. 257, 384 P.2d 649]; *French v. French* (1941), 17 Cal.2d 775 [112 P.2d 235, 134 A.L.R. 366]; *Crossan v. Crossan* (1939) 35 Cal.App.2d 39 [93 P.2d 609].)

Smith v. Lewis (1975), 13 C.3d 349 at 355; 118 Cal.Rptr. 621.

5. Respondent has no sufficient non-community assets from which to affect a lump sum settlement of the parties' community rights under the Plan.

6. Respondent did not list the Plan on his rights thereunder as a community asset in his Respondent (Marriage) and has not been consistently current in his child support payments.

IT IS, THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. Petitioner is entitled to one-half of that portion of Respondent's pension credits under the Plan and earned during the marriage, calculated to be .854 of a "Related Credit" plus 11.241 of "Local 12 Service Credits". Thus, Petitioner's community share of Respondent's pension credits is calculated to be .427 of a "Related Credit" plus 5.6205 of "Local 12 Service Credits". This calculation of credits is "unaudited" by the Trustees, and is subject to correction upon audit at the time a pension claim is made by Respondent or on his account.

2. Third-Party Defendants are ordered to pay directly to Petitioner her community share of Respondent's Plan benefits at the same time as Respondent's share is paid to him and in the same proportion to the total amount of Respondent's benefit(s) as one-half of the community pension credits (*i.e.,* now calculated to be .427 of a "Related Credit" plus 5.6205 "Local 12 Service Credits") bears to the total amount of credits earned by Respondent. As used herein, the term "Plan benefits" includes, but is not limited to, any and all regular retirement benefits, early retirement benefits, disability benefits and death benefits. A change in the label or description of any such

benefits shall not deprive Petitioner of her community share thereof.

3. Respondent shall notify Petitioner, in writing, at her last known address, of his intent to exercise any option under the Plan or to make a claim for benefits under the Plan at least 30 days prior to the exercise of any such option or the making of any such claim.

Proof of service by mail of the required notice shall be filed with this court.

4. Third-Party Defendants shall notify Petitioner, in writing, at her last known address, of any claim for benefits made by Respondent or on his account or of the exercise of any option made by Respondent or on his account at least 30 days prior to honoring any such claim or option choice.

Proof of service by mail of the required notice shall be filed with this Court.

5. The Trustees shall notify Petitioner, in writing, at her last known address, of any request for death benefits on Respondent's account at least 60 days prior to payment of any such benefits. Said notice shall inform Petitoner of all parties claiming an interest on Respondent's account.

Proof of service by mail of the required notice shall be filed with this court.

6. This court expressly reserves jurisdiction to supervise any payments made on Respondent's account and to supervise the election of any benefit options for the best interests of the community.

7. The Respondent shall not take any action which impedes or frustrates Petitioner's receipt of her allocable community interest.

Approved as to form: /s/ Albert Rush,

ALBERT RUSH Attorney for Third-Party Defendants. Dated: 3/31/78.

IT IS SO ORDERED.

/s/ Hugo Fisher
JUDGE OF THE SUPERIOR COURT
HUGO FISHER

Dated: Apr 17, 1978.